IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1544

RONALD LEE HARPER,

Petitioner/Defendant,

vs.

UNITED STATES OF AMERICA,

Appellee/Plaintiff.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

ALEX LANDON
Attorney at Law

520 "E" St., Suite 1100
San Diego, CA 92101
(714) 236-1826

MICHAEL PANCER
Attorney at Law

520 "E" St., Suite 1100
San Diego, CA 92101
(714) 236-1826

Attorneys for Petitioner/
Defendant

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San Diego, CA 92101
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Attorneys for Petitioner/
Defendant

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TO THE NINTH CIRCUIT COURT OF APPEALS

This is a Petition for RONALD LEE HARPER for a Writ of Certiorari to review the Order made by the United States Court of Appeals for the Ninth Circuit on February 9, 1976, refusing to reverse MR. HARPER's conviction for possessing and dispensing cocaine in violation of Title

21 U.S.C. §§ 841(a)(1) and 846. The United States Court of Appeals for the Ninth Circuit ruled that the classification of cocaine as a Schedule II narcotic drug under 21 U.S.C. § 812(c) is arbitrary and rational. Specifically, the Court found that Congress had acted upon a constitutionally "rational basis" according to the test of United States v. Carolene Products Co., 304 U.S. 144, 153-4 (1938), in so classifying cocaine for the purposes of imposing penalties.

OPINIONS BELOW

To the Petitioner's knowledge there are no official or unofficial reports of the Order of the District Court refusing to grant RONALD LEE HARPER'S Motion for Dismissal of the Indictment. To Petitioner's knowledge, the Opinion in the United States Court of Appeals for the Ninth Circuit, affirming Petitioner's conviction, has not been officially or unofficially reported as yet. (A copy of said Opinion is attached to the Appendix hereto.)

JURISDICTION

1. On March 12, 1975, the Federal Grand Jury for the Southern District of California returned a Three-Count Indictment against Petitioner HARPER charging him with violations of 21 U.S.C. §§ 841 (a)(1) and 846.

2. On May 30, 1975, a hearing was held before the Honorable Gordon Thompson, Jr., United States District Judge, for disposition of Petitioner's motions to Suppress Evidence, for a Bill of Particulars and for Dismissal of the Indictment filed May 1, 1975, and to Sever Counts and to Reveal Informant filed May 5, 1975. The Motion to Dismiss was taken under submission by the trial court, and the case was continued until June 13, 1975, for disposition of the motion and stipulated facts for trial. On June 13, 1975, the court denied Petitioner HARPER'S Motion to Dismiss the Indictment, and after the court approved the filing of jury waivers, the trial commenced upon stipulated facts. The trial was adjourned until July 16, 1975, at which time the court found Petitioner not guilty as to

Count One, but guilty of the charges contained in Counts Two and Three. On August 20, 1975, Petitioner was committed to the custody of the Attorney General for treatment and supervision until discharged by the Youth Correction Division of the Board of Parole as provided in 18 U.S.C. § 5017(c). Petitioner thereafter filed a timely Notice of Appeal.

3. On February 9, 1976, the United States Court of Appeals for the Ninth Circuit affirmed HARPER'S conviction and on March 25, 1976, HARPER'S Petition for Rehearing and Suggestion for Rehearing En Banc was denied by said Court.

4. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is cocaine misclassified as a "narcotic" drug under the Controlled Substances Act and the Comprehensive Drug Abuse Prevention and Control Act of 1970?

2. Does the arbitrariness and irrationality of the classification of cocaine as a "narcotic" drug violate Petitioner's

constitutional protections against deprivation of liberty without due process of law and his guarantee of equal treatment that inheres in the Due Process Clause of the Fifth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fifth Amendment to the United States Constitution.

"No person shall be held to answer to a Capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice be put into jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process

of law; nor shall private property be taken for publis use, without just compensation."

2. Title 21 U.S.C. § 812

3. Title 21 U.S.C. § 841

The foregoing statutes have been set forth in the Appendix attached hereto.

STATEMENT OF THE FACTS

The entire case was tried solely on stipulated facts which were as follows:

1. That on December 17, 1974, following a telephone conversation with the defendant, RONALD LEE HARPER, a confidential informant and Special Agent Czerwinski of the Drug Enforcement Administration, under the surveillance of Special Agent Edward Becker, proceeded to the residence of defendant HARPER at 13204 Old Barona Road, Lakeside, California;

2. That at approximately 10:02 p.m., on December 17, 1974, Special Agent Czerwinski and the confidential informant arrived at defendant HARPER'S residence and the confidential informant exited the

undercover vehicle and entered the residence. At approximately 10:04 p.m., the confidential informant called for Special Agent Czerwinski, who also entered the residence. In the front room of defendant HARPER'S residence, were four unidentified males and one unidentified female;

3. That if Agent Czerwinski were called and sworn as a witness, she would testify as follows:

a. That she and the confidential informant remained in the front room of defendant HARPER'S residence for approximately five minutes before a white male, later identified as the defendant, RONALD LEE HARPER, entered the front room and instructed the confidential informant to go with him into a room at the rear of the residence;

b. That at approximately 10:30 p.m., the confidential informant reentered the front room and instructed Special Agent Czerwinski to join him in the room at the rear. Then Special Agent Czerwinski and the confidential

informant entered the rear bedroom with defendant HARPER who displayed to Special Agent Czerwinski a plastic bag containing approximately one pound of suspected cocaine;

c. That Special Agent Czerwinski examined the cocaine and told defendant HARPER that she was only interested in purchasing a small sample because she had other merchandise to look at;

d. That defendant HARPER exited the room, returning approximately one minute later with a scale and with which he weighed out approximately 2.54 grams of suspected cocaine from the bag containing one pound of suspected cocaine;

e. That defendant HARPER handed Special Agent Czerwinski the 2.54 grams of suspected cocaine, and Special Agent Czerwinski in return handed HARPER $100.00 of pre-recorded official government funds;

f. That Special Agent Czerwinski then told defendant HARPER that they

were going to look at some other cocaine and they would call him back later that evening to let him know if they would purchase the pound;

g. That Special Agent Czerwinski told defendant HARPER to retain the pound of cocaine until they decided if they wanted to purchase it, and defendant HARPER agreed not to sell the pound until he heard from them;

4. That at approximately 10:40 p.m., Special Agent Czerwinski and the confidential informant exited the defendant's residence and departed the area in the undercover vehicle;

5. That on December 18, 1974, Special Agent Czerwinski was fitted with a body transmitter and supplied with $16,000.00 pre-recorded government funds. Then Special Agent Czerwinski and the confidential informant proceeded to the residence of defendant RONALD LEE HARPER at 13204 Old Barona Road, Lakeside, California, under surveillance of Officers Bailey and Nichols;

6. That at approximately 5:45 p.m., Special Agent Czerwinski and the confidential informant arrived at the defendant's residence. Special Agent Czerwinski remained in the vehicle while the confidential informant entered the residence. Approximately five minutes later, an unidentified male exited the residence and was observed walking around the area. A few minutes later, five males exited the residence and surrounded the undercover vehicle. Shortly thereafter, the males left the area of the undercover vehicle and were observed in the immediate area;

7. At approximately 5:50 p.m., defendant HARPER and the confidential informant exited the residence. The confidential informant entered the undercover vehicle and advised Special Agent Czerwinski that defendant HARPER had informed him that police were in the area. Special Agent Czerwinski then instructed the confidential informant to drive from the area immediately;

8. While Special Agent Czerwinski and the confidential informant were driving away, defendant HARPER stopped the

vehicle and told them to call him later and that they could possibly do the transaction as previously arranged. However, negotiations were subsequently terminated for the safety of Special Agent Czerwinski and the confidential informant;

9. That on January 27, 1975, Special Agent Becker obtained a warrant of arrest for defendant HARPER. However, attempts to locate defendant HARPER were unsuccessful until March 5, 1975, when he was arrested as a result of a surveillance in an unrelated narcotic investigation at the Plaza International Hotel in El Cajon, California.

10. That the cocaine referred to in the indictment need not be introduced into evidence at the time of trial.

11. That the chemist report . . . may be considered as proof of the nature of the contraband involved;

(Numbers 12 and 13 are omitted as they have no bearing on the facts of the case.)

REASONS WHY THE WRIT SHOULD BE GRANTED

Due to the increasing level of scientific knowledge regarding narcotic substances, the continual inclusion of cocaine as a "narcotic" and its inclusion as a Schedule II item with the other addicting opiates contained in Schedule II is totally erroneous, contrary to all of the scientific evidence on the subject, and is not supported by any rational bases. Because of this erroneous classification, a prosecution under 21 U.S.C. §§ 841 and 846 relating to cocaine constitutes a clear violation of the Petitioner's constitutional rights to equal protection of the law, due process of the law and discriminatory and arbitrary prosecutions. As the prosecution in the instant case was based upon a series of laws which have no basis in science and fact and as many of Petitioner's constitutional rights were thereby violated, it is respectfully submitted that such laws should no longer be endured in modern society and in the interests of justice and as a matter of law, this Honorable Court must conclude that the classification of cocaine as a

Schedule II narcotic drug under 21 U.S.C. § 812(c) is arbitrary and irrational and thus unconstitutional.

ARGUMENT

A.

THE CLASSIFICATION OF COCAINE AS A SCHEDULE II NARCOTIC DRUG IS ARBITRARY, IRRATIONAL AND WITHOUT BASIS IN FACT

In the recent decision of United States v. Castro, ___ F. Supp. ___, 16 Crim.L.Rptr. 2511 (March 1975), the United States District Court for the Northern District of Illinois decided that cocaine had been arbitrarily and irrationally classified as a narcotic for penalty purposes under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841. The court found significant differences between cocaine and other drugs classified as narcotics. The court also found, as many authorities have long contended, that cocaine is not addictive.[1/]

1/ Although sympathetic to the argument that cocaine was misclassified as a narcotic, the Castro court concluded that the consideration of any unresolved

(Continued)

The court specifically stated:

> "Even though the available body of knowledge will not permit us to draw conclusions as to the impact of cocaine on a person's health, it is clear that the effects are vastly different from those generally associated with true narcotics. Based on the foregoing, it is clear, from a medical standpoint, that Congress has erroneously classified cocaine with heroin and other opiates for penalty purposes."
> (Emphasis added.)

Though the government has not chosen to make use of the already existing body of scientific and social knowledge on the subject, this Court, as did the Castro court, can no longer ignore the evidence that cocaine is not a narcotic drug and it is respectfully submitted that no reputable physician in this country would

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1/ Continued:
questions was better left to Congress and the Attorney General.

testify that it is a narcotic drug. If the instant Petition is granted, the Opening Brief will trace for the Court the history of cocaine usage and legislation in the United States and the ill-founded reasons for its inclusion in Schedule II with the attendant severe penalties for its use and distribution. Such a history will clearly demonstrate that the failure of Congress to classify cocaine as a non-narcotic drug has been largely the result of a distortion of science, liberally laced with doses of racism, superstition and supposition. Furthermore, scientific and medical evidence in the form of affidavits will be introduced by Petitioner which will affirm the position that cocaine is improperly classified as a Schedule II item, and at the very worst should be included in Schedule III with the amphetamines with which cocaine bears a closer resemblance than the addicting opiates contained in Schedule II.

Indeed, Congress itself when it set up the findings required for each of the Schedules found in § 812(b), established requirements which compels the inclusion

of cocaine in Schedule III.

Subsection (b)(2) provides:

"(2) Schedule II. . .

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substance may lead to a severe <u>phychological or physical dependence</u>." (Emphasis added.)

Subsection (b)(3) provides:

"(3) Schedule III. . .

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in Schedule I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to <u>moderate or low physical dependence or high psychological dependence</u>."
(Emphasis added.)

It can be readily seen, then, that given the opportunity Petitioner HARPER could prove that cocaine falls squarely within the requirements established for Schedule III items, and not within those required for narcotic drugs contained in Schedule II. Thus, the classification of cocaine as a "narcotic" is totally erroneous, arbitrary, irrational and without any basis in fact.

B.

THE DESPARATE PENALTIES PROVIDED BY THE ACT UPON CONVICTION FOR COCAINE OFFENSES, IN COMPARISON WITH THOSE FOR OFFENSES INVOLVING OTHER STIMULANTS, VIOLATE THE GUARANTEE OF EQUAL TREATMENT THAT INHERES IN THE DUE PROCESS CLAUSE

Because of the erroneous classification of cocaine as a "narcotic", 21 U.S.C. § 802 (16), the Petitioner or any other person charged under the provisions

of 21 U.S.C. § 841 faces a possible 15 years in prison and a fine of $25,000 on each charged violation, 21 U.S.C. § 841 (B)(1)(A), whereas a person charged with the distribution of a non-narcotic drug subjects himself to a maximum of 5 years in prison and a fine of $15,000, 21 U.S.C. § 841 (B)(1)(B). As it is a fundamental principle that punishment may differ among like offenders only with justification or upon due legislative consideration, the fact that Congress has improperly classified cocaine as a narcotic substance constitutes a clear violation of Petitioner's due process right of equal protection as guaranteed by the Fifth Amendment to the United States Constitution.

The due process clause embraces the principle of equal protection and fundamental fairness (See Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).) As to the guarantee of equal treatment that inheres in the due process clause; cf. United States v. American Honda Motor Co., 273 F. Supp. 810, 819 (N.D. Ill. 1967), a violation of constitutional dimensions

arises from the desparate penalties provided by the Act. The reason is not that Congress may not decide that different drugs warrant different treatment for sentencing purposes. It is that Congress inaccurately has regarded cocaine as addictive, not as a more dangerous drug than amphetamines and barbituates. Without a shred of evidence to the contrary, and in light of the uncontested fact that cocaine's properties and effects are less striking than those of drugs to which five-year penalties attach, the ten-year differential in sentence establishes cognizable discrimination. (See, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942); Hodgson v. Vermont, 168 U.S. 162, 173 (1897).)

C.

SINCE INCORRECT FACTS UNDERLAY THE CONGRESSIONAL CLASSIFICATION OF COCAINE AS A NARCOTIC DRUG, THE RIGHT TO DUE PROCESS OF LAW IS INFRINGED

It is also contended that the application of the penalty provision on the Comprehensive Drug and Abuse Prevention and Control Act of 1970 violates the

constitutional protection against deprivation of liberty without due process of law (United States Constitution, Amendment V). Again, the reason is that Congress misclassified cocaine as "narcotic" drug in the first federal legislation[2/] and has failed to remedy the error. The pertinent rule is therefore that which requires the invalidation of legislation that is based upon incorrect facts (e.g., Turner v. United States, 396 U.S. 398, 419 (1970) (Congressional determination that all cocaine could be presumed imported was "more-likely-than-not" incorrect); Leary v. United States, 395 U.S. 6, 38 & n.68 (1969) (Statutes based on legislative declaration of facts is constitutionally invalid; courts are free to re-examine such factual declarations).) Here, of course, it is contended that cocaine is not the substance the statute makes it, a narcotic drug, so that no question can exist of the arbitrariness and irrationality of the classification.

2/ Harrison Narcotic Act of 1914.

D.

THE "RATIONAL BASES" TEST CAN NO LONGER JUSTIFY THE CLASSIFICATION OF COCAINE AS A SCHEDULE II NARCOTIC

Petitioner realizes that the numerous courts that have recently dealt with this subject[3/] have all decided favorably for the government on the theory that Congress has acted upon a constitutionally "rational basis" in classifying cocaine as a "narcotic" for penalty purposes. Each court was able to find some "rational basis" to sustain the statute, and concluded that any resolution of the issue belongs more properly with Congress or the Attorney General.

Assuming that cocaine is a dangerous drug and represents a potential hazard to

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3/ United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973); United States v. Miller, 387 F. Supp. 1097 (D. Conn. 1975); United States v. Amidzich, 396 F. Supp. 1140 (E.D. Wis. 1975); United States v. Hobbs, 392 F. Supp. 444 (D. Mass. 1975); United States v. DiLaura, 394 F. Supp. 770 (D. Mass. 1974); United States v. Brookins, 383 F. Supp. 1212 (D. N.J. 1974).

public's health, safety and welfare, it is respectfully submitted that the control of possible cocaine abuse could be accomplished just as effectively with the inclusion of cocaine in Schedule III, where it scientifically and constitutionally belongs. It is simply unreasonable to continually ignore the fact that cocaine is not a narcotic, and that Congress was wrong when it classified cocaine as one in 1914 and is still in error after 60 years. Though it is for the legislature, rather than the judiciary, to make new law, where the laws enacted by the legislature are unconstitutional or have been applied in such a way as to deny constitutional rights, then the courts are empowered to act and may grant whatever relief necessary to vindicate constitutional wrongs. See Clark v. Board of Education, 350 F. Supp. 149, 151 (E.D. Ky. 1972). To subject Petitioner to the penalties provided in 21 U.S.C. § 841 (B)(1)(A) for Schedule II offenses rather than the penalties for Schedule III offenses found in 21 U.S.C. § 841(B)(1)(B) is a clear violation of his constitutional protections against deprivation of liberty

without due process of law and his guarantee of equal treatment that inheres in the Due Process clause. And whatever "rational bases" have been advanced in the past to support the classification, the fact remains that constitutional rights are still being violated by an invalid statute.

In United States v. Carolene Products, 304 U.S. 144 (1938), a case relied upon by the Circuit Court of Appeals, the Supreme Court made the following statement:

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing the court that those facts have ceased to exist." United States v. Carolene Products, supra, 304 U.S. at 153. (Emphasis added.)

It is respectfully submitted by Petitioner that not only have the facts ceased to exist for the classification of cocaine as a "narcotic", but if given the opportunity, Petitioner will demonstrate that such facts never did exist. There has simply been a perpetuation of the original error throughout this century which Congress, the government, and the courts refuse to remedy. How much longer can the evidence be ignored that cocaine is not a narcotic drug? How much longer will the courts refuse to act to correct this error that denies defendants substantial constitutional safeguards by falling back on the ability to find some "rational basis" to support the statute and then leaving to the legislature the responsibility of correcting its own error? It is the hope of Petitioner that the Court will grant the requested Petition and to listen to the arguments and to finally judge the suspect classification in light of today's knowledge, recognizing that the classification has become quite arbitrary and irrational with the passage of time, and to finally end the injustice

that has inhered in applying the invalid statute.

CONCLUSION

For the above mentioned reasons, Petitioner RONALD LEE HARPER respectfully requests that this Honorable Court grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

ALEX LANDON

MICHAEL PANCER

Attorneys for Petitioner/
Defendant

APPENDIX

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. RONALD LEE HARPER, *Defendant-Appellant.*	No. 75-2993 MEMORANDUM

[February 9, 1976]

Appeal from the United States District Court
for the Southern District of California

Before: CHAMBERS and WRIGHT, Circuit Judges,
and EAST,* Senior District Judge.

We affirm the conviction of petitioner Ronald Lee Harper for possession and dispensing of cocaine, rejecting his sole contention on appeal that the classification of cocaine as a Schedule II narcotic drug under 21 U.S.C. § 812(c) is arbitrary and irrational.

Numerous district courts have recently dealt with this argument. *United States v. Amidzich,* 396 F. Supp. 1140, 1147 (E.D. Wis. 1975); *United States v. Hobbs,* 392 F. Supp. 444, 446 (D. Mass. 1975); *United States v. DiLaura,* 394 F. Supp. 770, 773 (D.Mass. 1974); *United States v. Brookins,* 383 F. Supp. 1212, 1217 (D.N.J. 1974). In all cases, the courts expressed the opinion that Congress had acted upon a constitutionally "rational basis" according to the test of *United States v. Carolene Products Co.,* 304 U.S. 144, 153-4 (1938), in so classifying cocaine for the purpose of imposing penalties. *See also United States v. Smaldone,*

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

484 F.2d 311, 319-20 (10th Cir. 1973), *cert. denied* 415 U.S. 915 (1974) and *United States v. Miller*, 387 F. Supp. 1097, 1098 (D. Conn. 1975), where slightly different reasoning nonetheless led the courts to the same conclusion that Congress had not acted arbitrarily.

Petitioner's reliance upon the district court's decision in *United States v. Castro*, 401 F. Supp. 120 (N.D.Ill. 1975), is misplaced. The court found no fundamental right of defendant involved[1] and therefore reasoned that the "rational basis" test of *Carolene, supra*, must be applied. The court then cited the language of *Brookins, supra*, observing that continuing medical debate, potential for societal harm, and general uncertainty as to whether Congress classified cocaine on more of a penal or medical basis, were grounds that could constitute the required rational basis for sustaining the statute. Although sympathetic to the argument that cocaine was misclassified as a narcotic, the court concluded that the consideration of any unresolved questions was better left to Congress and the Attorney General. We agree and affirm the conviction.

[1] *See Duffy v. Wells*, 201 F.2d 503 (9th Cir. 1953).

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APPENDIX

§812. Schedules of controlled substances - Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semi-annual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

Placement on Schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

* * *

(2) Schedule II. -

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III. -

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

* * *

Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

* * *

Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alphaprodine.

(2) Anileridine.

(3) Bezitramide.

(4) Dihydrocodeine.

(5) Diphenoxylate.

(6) Fentanyl.

(7) Isomethadone.

(8) Levomethorphan.

(9) Levorphanol.

(10) Metazocine.

(11) Methadone.

(12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-Dephenyl butane.

(13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.

(14) Pethidine.

(15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.

(16) Pethidine-Intermeditae-B, ethyl-4-phenylpiperidine-4-carboxylate.

(17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.

(18) Phenazocine.

(19) Piminodine.

(20) Racemethorphan.

(21) Racemorphan.

(c) Unless specifically excepted or unless listed in another schedule, any injectable liquid which contains any quantity of methamphetamine, including its sales, isomers, and salts of isomers.

Schedule III

(a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.

(2) Phenmetrazine and its salts.

(3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

(4) Methylphenidate.

(b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.

(2) Chorhexadol.

(3) Glutethimide.

(4) Lysergic acid.

(5) Lysergic acid amide.

(6) Methyprylon.

(7) Phencyclidine.

(8) Sulfondiethylmethane.

(9) Sulfonethylmethane.

(10) Sulfonmethane.

(c) Nalorphine.

(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.

(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.

(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, non-

narcotic ingredients in recognized therapeutic amounts.

(8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

§841. Prohibited acts A - Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of

this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(b) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any

other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this

chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or

depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1) (B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment.

A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Pub.L. 91-513, Title II, §401, Oct. 27, 1970, 84 Stat. 1260.

No. 75-1544

In the Supreme Court of the United States

OCTOBER TERM, 1975

RONALD LEE HARPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that cocaine is arbitrarily and irrationally classified as a narcotic drug under the Comprehensive Drug Abuse Prevention and Control Act of 1970.

After a jury-waived trial upon stipulated facts in the United States District Court for the Southern District of California, petitioner was convicted of one count of possessing cocaine with intent to distribute it and one count of distributing and dispensing cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to treatment and supervision under the Youth Corrections Act, 18 U.S.C. 5010(b). The court of appeals affirmed (Pet. App. A).

The stipulated facts (Pet. 6-11) show that in December 1974, petitioner sold an undercover agent of the Drug Enforcement Administration approximately 2.5 grams of

cocaine and made arrangements to sell her an additional pound of that drug. The second transaction was not consummated, however, because at the time of the proposed sale, petitioner learned that the police were present in the area and refused to proceed, although he expressed continued interest in completing the planned exchange at a later date.

Petitioner contends (Pet. 13) that the classification of cocaine as a narcotic drug (a Schedule II controlled substance) under 21 U.S.C. 812(c) is arbitrary and without basis in fact, and that as a result of such erroneous classification, he was improperly subjected to a harsher maximum penalty than persons convicted of offenses involving non-narcotic drugs, in violation of the Due Process and Equal Protection Clauses of the Fifth Amendment.[1]

As petitioner recognizes (Pet. 21), all the courts that have considered a similar challenge to the classification of cocaine as a narcotic drug have rejected it. *United States* v. *Smaldone*, 484 F. 2d 311, 319-320 (C.A. 10), certiorari denied, 415 U.S. 915; *United States* v. *Brookins*, 383 F. Supp. 1212 (D. N.J.); *United States* v. *Hobbs*, 392 F. Supp. 444 (D. Mass.); *United States* v. *Castro*, 401 F. Supp. 120 (N.D. Ill.); *United States* v. *Umentum*, 401 F. Supp. 746 (E.D. Wis.).

[1]The Court need not reach this latter argument, if, as the court of appeals did, it rejects petitioner's contention that the classification of the drug is arbitrary and irrational. In any event, petitioner was not prejudiced by the disparate maximum penalties for possession of narcotic and non-narcotic controlled substances, for he was sentenced to treatment under the Youth Corrections Act. Thus, this case presents no occasion to review that question.

The constitutionality of the legislative classification of cocaine as a narcotic drug depends upon whether that classification rests upon "some rational basis within the knowledge and experience of the legislators." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152. Congress had a rational basis for concluding that cocaine has a high potential for abuse and that its misuse might lead to severe psychological or physical dependence, as indicated in 21 U.S.C. 812(b)(2)(A) and (C). See *Marshall* v. *United States*, 414 U.S. 417, 427-428. As the lower courts have recognized, although the pathological effects of cocaine usage are a subject of continuing medical debate, the drug's potential for societal harm is generally accepted (Pet. App. A 2). Under these circumstances, the legislative classification of cocaine as a narcotic drug is valid. See *McGinnis* v. *Royster*, 410 U.S. 263, 276.[2]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

[2]Petitioner's reliance (Pet. 13-14) on *United States* v. *Castro*, *supra*, is misplaced. As the court of appeals noted (Pet. App. A 2), although the court in that case was sympathetic to the argument that cocaine may not be a narcotic in the strict pharmacological sense, it nonetheless concluded that there was a rational basis for its classification as a narcotic drug for regulatory purposes.